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COURT OF CRIMINAL APPEALS
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NO. _____

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

FILED
COURT OF CRIMINAL APPEALS
12/28/2020
DEANA WILLIAMSON, CLERK

MARIO ERNESTO MARTELL **APPELLANT**

V.

THE STATE OF TEXAS **APPELLEE**

THE STATE'S PETITION FOR DISCRETIONARY REVIEW

**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS
CAUSE NUMBER 08-18-00180-CR**

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TRIAL COURT: Criminal District Court No. One of El Paso County, Texas, Hon. Diane R. Navarette, presiding

COURT OF APPEALS: Eighth Court of Appeals, Honorable Chief Justice Jeff Alley, Justice Yvonne T. Rodriguez, and Justice Gina M. Palafox

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STATEMENT REGARDING ORAL ARGUMENT

The State does not believe that oral argument is necessary in this case, as the issue presented herein is purely a question of law, and the State's arguments are and will be set out fully in this petition and brief, should this Court grant review. However, should this Court determine that oral argument would be helpful in resolving the issue raised in this petition, the State would certainly welcome the opportunity to appear before the Court.

STATEMENT OF THE CASE

Appellant, Mario Ernesto Martell, was indicted for the third-degree-felony offense of possession of marijuana in an amount of 50 pounds or less but more than 5 pounds. (CR at 7).[1] On October 6, 1999, Martell entered a negotiated plea of guilty, and pursuant to the plea agreement, the trial court deferred adjudication and placed Martell on community supervision for a period of 4 years. (Supp. CR at 5-12 – the docket sheet and plea papers); (CR at 19-24).

On March 4, 2002, within the original period of community supervision, the State filed a motion to adjudicate Martell's guilt. (CR at 28-35). After a contested adjudication hearing conducted over three days in 2018, the trial court adjudicated Martell guilty of the possession-of-marijuana charge and placed him on "straight" probation for 10 years. (RR5 at 8-11); (CR at 73-74). Martell timely filed notice of appeal from this adjudication. (CR at 79, 94).

[1] Throughout this petition, references to the appellate record will be made as follows: references to the clerk's record will be made as "CR" and page number, references to the supplemental clerk's record will be made as "Supp. CR" and page number, and references to the reporter's record will be made as "RR" and volume and page number.

STATEMENT OF PROCEDURAL HISTORY

On November 20, 2020, in a published opinion, the Eighth Court of Appeals reversed the trial court's judgment adjudicating Martell's guilt and remanded the case to the trial court with instructions to dismiss the motion to adjudicate. *See Martell v. State*, ___ S.W.3d ___, No. 08-18-00180-CR, slip op. at 12 (Tex.App.–El Paso, Nov. 20, 2020, pet. filed)(not yet reported)(opinion attached as appendix). No motion for rehearing was filed.

GROUND FOR REVIEW

After holding that the evidence was legally and factually insufficient to support the trial court's rejection of the defendant's due-diligence affirmative defense, the Court of Appeals erred in failing to further address the issue of estoppel, even though the State raised the estoppel issue in the trial court, the trial court relied on the estoppel issue in proceeding to adjudicate the defendant's guilt, and the State again raised the estoppel issue in the Court of Appeals.

FACTUAL SUMMARY

Martell's community supervision

When Martell was initially placed on deferred-adjudication community supervision on October 6, 1999, the trial court granted his request and expressly permitted him to reside and work at a specific address in Juarez, Mexico, during the period of his supervision. (CR at 22-24 – term and condition h.(2) of Martell's community supervision). However, he was still required to report to his probation officer in El Paso once a month. (CR at 22-24 – term and condition d.(1) of Martell's community supervision).

After only a couple of months, Martell stopped reporting to his probation officer in El Paso as required, and on March 4, 2002, the State filed its motion to adjudicate Martell's guilt, alleging–among other things–that Martell had failed to report to his probation officer as required during the months of December of 1999 through December of 2001. (CR at 28-35). A capias for Martell's arrest to answer to the motion to adjudicate was issued that same date (March 4, 2002), but Martell was not thereafter arrested until August 11, 2017. (CR at 53-54).

The adjudication proceedings

At the contested revocation/adjudication hearing on January 26, 2018, Adrian Aguirre, a court-liaison officer with the probation department, testified that

Martell was placed on probation on October 6, 1999, and that after he stopped reporting, he was considered to be an absconder. (RR3 at 6-7). Aguirre testified that Martell's file indicated that after Martell failed to report in December of 1999, the department "did their follow-up" and sent a letter to his (Martell's) address in Juarez, and when Martell again failed to report in January 2000, the department sent a second letter to his (Martell's) Juarez address. (RR3 at 8-9). And after sending this second letter, the department also tried to contact Martell by telephone on February 15, 2000, calling the number Martell had provided, but this attempt was unsuccessful. (RR3 at 9-13).[2] After these unsuccessful attempts to locate Martell, the probation department obtained, on October 9, 2000, a bench warrant for Martell's arrest for failing to report, and they further began submitting violation notices to the District Attorney's Office so that the State could file a motion to revoke Martell's community supervision. (RR3 at 13).

Upon further questioning by the trial court, Aguirre testified that Martell's file indicated that he both resided and worked in Juarez, and he (Aguirre) agreed with the court that Martell's probation officer "would not be able to go to Juarez to do any home visits or anything like that." (RR3 at 21-22).

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[2] Aguirre testified that Martell's file indicated that this call was answered by someone named "Maribel," who claimed to be a "friend of the family." (RR3 at 13).

In her argument to the court, the prosecutor recognized the due-diligence affirmative defense codified in the Texas Code of Criminal Procedure. (RR3 at 23).[3] The prosecutor argued, however, that because Martell was allowed to reside and work in Mexico, neither the probation department nor any other local law-enforcement agency or officer had any jurisdiction to attempt to make contact with him in person at his listed and last-known residence and employment address in Mexico. (RR3 at 23-25). She further argued that the record showed that the authorities did attempt to make contact with Martell after he stopped reporting by sending letters to his listed address and calling his listed telephone number. (RR3 at 24). In closing, the prosecutor argued that because Martell was allowed to reside and work in Mexico, he should not get the benefit of remaining in that foreign country, beyond the reach and jurisdiction of the local probation and law-enforcement authorities. (RR3 at 29-30).

In taking the due-diligence issue under advisement, the trial court noted that this case was different than most cases, in that no officer could go into Mexico to contact Martell or execute the warrant or capias, such that it was legally

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[3] *See* TEX. CODE CRIM. PROC. art. 42A.109 (providing that it is an affirmative defense to revocation/adjudication based on a failure to report that no supervision officer, peace officer, or other officer with the power to arrest under a warrant issued for that alleged violation contacted or attempted to contact the defendant in person at the defendant's last-known residence address or employment address, as reflected in the files of the local probation department).

impossible to try to make personal contact with Martell in Mexico. (RR3 at 34-35).

The trial court reconvened the case on May 31, 2018, indicated that it had considered the parties' arguments and reviewed the caselaw on the due-diligence issue, and rejected Martell's defense and found the failure-to-report allegations in the motion to adjudicate to be true:

> [The Court]: …We had had a contested revo and there had been evidence, I guess, presented. And then what had happened is that both sides submitted – I guess the whole issue was on whether Mr. Martell had received – there had been efforts from the probation department to reassert supervision and whether he had been contacted.
>
> * * *
>
> [The Court]: All right. And then so I was provided with case law. I don't think – I don't think I signed an order. So I want to make sure that I put it on the record that I did consider the arguments on the due diligence. And that in chambers, I did tell both sides that the fact that Mr. Martell had been given permission to reside in Mexico, that I didn't feel that it was in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.
>
> So at that point, I asked that this hearing be set so that then I could – we can determine, I guess, how we were going to move forward with the case.
>
> So I did find that the allegations in the motion to adjudicate guilt were true, that he didn't report during that – this period of time in violation of his probation. So now, we need to go forward on, I guess, what we do after this.

(RR4 at 5). Thereafter, the court heard evidence and arguments on the issue of sentencing and took the sentencing issue under advisement. (RR4 at 6-35). Some

3½ months later, on September 12, 2018, the trial court formally adjudicated Martell's guilt, sentenced him to 10-years' confinement, and probated the sentence and placed him on 10-years' "straight" probation. (RR5 at 8-11); (CR at 73-74).

The Court of Appeals

The Eighth Court of Appeals reversed the trial court's judgment adjudicating Martell's guilt. Specifically, the Court of Appeals held that the evidence was legally insufficient to support the trial court's rejection of Martell's due-diligence affirmative defense because the evidence showed that no attempts were made to contact Martell in person at his listed and last-known residence or work address in Mexico, as required by article 42A.109 of the Texas Code of Criminal Procedure. *See Martell v. State*, slip op. at 11-12.

ARGUMENT AND AUTHORITIES

GROUND FOR REVIEW: After holding that the evidence was legally and factually insufficient to support the trial court's rejection of the defendant's due-diligence affirmative defense, the Court of Appeals erred in failing to further address the issue of estoppel, even though the State raised the estoppel issue in the trial court, the trial court relied on the estoppel issue in proceeding to adjudicate the defendant's guilt, and the State again raised the estoppel issue in the Court of Appeals.

> **REASON FOR REVIEW:** The Court of Appeals has decided an important question of state law in a way that conflicts with the applicable decisions of the Court of Criminal Appeals. TEX. R. APP. P. 66.3(c); *State v. Bernard*, 512 S.W.3d 351 (Tex.Crim.App. 2017); *see also* TEX. R. APP. P. 47.1.

I. The trial court relied on a theory of estoppel in proceeding to adjudicate Martell's guilt.

While neither the State nor the trial court expressly used the term "estoppel" during the revocation/adjudication proceedings, the record clearly shows that the prosecutor argued that Martell should be estopped from successfully asserting a due-diligence offense because he was allowed to live and work in Mexico, out of the jurisdictional reach of local probation and law-enforcement authorities. (RR3 at 23-25 – where the prosecutor argued that because Martell was allowed to reside and work in Mexico, neither the probation department nor any other local law-enforcement agency or officer had any jurisdiction to attempt to make contact with him in person at his listed and last-known residence and employment address in Mexico). And the record further shows that in proceeding to adjudicate Martell's

guilt, the trial court likewise based its rejection of Martell's asserted due-diligence affirmative defense on notions of estoppel, ruling that Martell should not get to accept the benefit of being allowed to live in Mexico while at the same time using that benefit to shield himself from later revocation/adjudication: "...the fact that Mr. Martell had been given permission to reside in Mexico, that I didn't feel that it was in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County." (RR4 at 5).

II. The State again raised and argued the issue of estoppel in the Court of Appeals.

In its brief in the Court of Appeals, the State, after arguing that strict compliance with the requirement in article 42A.109 of an attempt at "in-person" contact with the defendant at his last-known address should not be required under the particular circumstances of this case, namely, the legal and factual impossibility of such compliance because no local probation or law-enforcement officer had the jurisdictional authority to enter Mexico to contact Martell in person at his listed and last-known address, the State again raised and argued the theory of estoppel. Specifically, the State argued that Martell should not be allowed to rely on the benefit he received from the trial court in being allowed to reside and

work in Mexico as a shield against subsequent revocation/adjudication of his deferred-adjudication community supervision:

> In this case, Martell was given a huge benefit when, at the time he was initially placed on deferred-adjudication community supervision, the trial court granted him permission to live and work in Mexico as he requested, conditioned on his agreement to report to his probation officer here in El Paso on a monthly basis. And to now hold that the State failed to exercise due diligence in attempting to make in-person contact with him, after Martell breached his agreement to report and instead intentionally remained in Mexico beyond the jurisdictional reach of the probation department and other local law-enforcement agencies, would have the effect of judicially sanctioning such evasive efforts by other probationers similarly granted permission to reside and work in Mexico. As the trial court appropriately recognized, this would not serve the interest of justice.

See (State's brief in the Court of Appeals, at p. 26).

III. The Court of Appeals did not address the estoppel issue in its opinion, even though the issue was raised and was necessary to final disposition of the appeal.

Rule 47.1 of the Texas Rules of Appellate Procedure demands that a court of appeals address in its written opinion every issue raised and necessary to final disposition of the appeal. *See* TEX. R. APP. P. 47.1; *State v. Bernard*, 512 S.W.3d 351, 352 (Tex.Crim.App. 2017). But in its opinion in this case, the Court of Appeals did not in any way address the estoppel issue, even though, as shown above in the discussion of the underlying proceedings: (1) the State argued the theory of estoppel in the trial court; (2) the trial court relied on the theory of

estoppel in rejecting Martell's asserted due-diligence affirmative defense and proceeding to adjudicate guilt; and (3) the State raised and argued that same theory of estoppel in the Court of Appeals. The question, then, is whether the estoppel issue constitutes an issue necessary to final disposition of this appeal, such that it should have been addressed by the Court of Appeals.

In its opinion, the Court of Appeals held that Martell had satisfied his burden of proving the due-diligence affirmative defense because the evidence showed that no probation or law-enforcement officer ever attempted to contact him in person at his listed residence or employment address in Mexico. *See Martell v. State*, slip op. at 11-12. In so holding, the Court of Appeals expressly rejected the State's argument that strict compliance with article 42A.109 was not, and should not be, required under the particular circumstances of this case. *See id.*

But in this case, the holding that Martell produced sufficient evidence to prove his due-diligence affirmative defense should not, and does not, end the inquiry. As the State argued in the trial court, as the trial court ruled, and as the State again argued in the Court of Appeals, even if the evidence showed a failure of strict compliance with the in-person-contact requirement of article 42A.109, Martell should be nevertheless estopped from relying on such failure of strict compliance where such strict compliance was a legal and factual impossibility due

to Martell's receipt of the benefit of being allowed to reside and work outside of the jurisdictional authority of local probation and law-enforcement officers.

Simply, Martell asked the trial court for permission to reside and work in Mexico during the period of his deferred-adjudication community supervision, and the trial court granted that request. The inescapable result of Martell asking for and receiving that benefit from the trial court was the jurisdictional inability of any local officer to physically go to Martell's authorized place of residence or work to attempt in-person contact with him once he (Martell) stopped reporting to his probation officer. And as the trial court properly reasoned and ruled, Martell should not be allowed to use that granted benefit of being allowed to reside and work in Mexico as an offensive sword (or defensive shield) in the revocation/adjudication litigation of the due-diligence issue.[4]

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[4] As this Court has explained, under a theory of "estoppel by judgment," a defendant who accepts the benefits of a judicial order (here, the trial court's terms and conditions of community supervision granting Martell's request to reside and work in Mexico) is thereafter estopped from rejecting any burdensome consequences of the order. *See Rhodes v. State*, 240 S.W.3d 882, 891 (Tex.Crim.App. 2007). And under a theory of "estoppel by contract," a defendant who accepts the benefits of a community-supervision contract with the trial court is thereafter estopped from questioning the effect of such community-supervision contract. *See id.* These types of estoppel apply to nullify any kind of systemic breakdown (except for a lack of subject-matter jurisdiction) in the community-supervision context. *See Gutierrez v. State*, 380 S.W.3d 167, 177 (Tex.Crim.App. 2012). And these rules of estoppel may even bar relief on what would otherwise be an absolute requirement. *See Colone v. State*, 573 S.W.3d 249, 265 (Tex.Crim.App. 2019), *citing Saldano v. State*, 70 S.W.3d 873, 888 (Tex.Crim.App. 2002)("We have held that a party may be estopped from relying on an absolute requirement."). As such, to any extent article 42A.109 establishes an absolute requirement of an attempt at in-person contact at the defendant's last-known address or place of employment, a defendant may, depending on the circumstances,

The Court of Appeals, however, wholly failed to address this estoppel issue or answer the question of whether Martell is or should be estopped from successfully raising and proving his due-diligence affirmative defense when the State's strict compliance with article 42A.19 was rendered legally and factually impossible by Martell's request for, and receipt of, permission to reside and work in Mexico during the period of his community supervision. This issue was raised in the trial court (and in fact formed the basis for the trial court's ultimate ruling), was again raised in the Court of Appeals, and must necessarily be answered in order to fully dispose of this appeal. *See* TEX. R. APP. P. 47.1. The Court of Appeals thus erred in failing to address the estoppel issue in its opinion in this case. *See State v. Bernard*, 512 S.W.3d at 352 (holding that where the court of appeals addressed and rejected only one of the State's two arguments in support of the lawfulness of a traffic stop, the court of appeals erred and failed to comply with rule 47.1, which requires the court of appeals to address every issue raised therein that is necessary to final disposition of the appeal). This Court should therefore vacate the judgment of the Court of Appeals and remand the case to the Court of Appeals to address the estoppel issue raised therein by the State. *See State v. Bernard*, 512 S.W.3d at 352 (where this Court vacated the judgment of the

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be estopped from relying on any such absolute requirement.

court of appeals and remanded the case to the court of appeals to address the State's second argument in support of the lawfulness of the traffic stop).

PRAYER

WHEREFORE, the State prays that this petition for discretionary review be granted, and that upon hearing, the Court vacate the judgment of the Court of Appeals and remand the case to the Court of Appeals to address the estoppel issue raised therein by the State.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the foregoing document, beginning with the factual summary on page 1 through and including the prayer for relief on page 12, contains 2,914 words, as indicated by the word-count function of the computer program used to prepare it.

/s/ Tom A. Darnold
TOM A. DARNOLD

CERTIFICATE OF SERVICE

(1) The undersigned does hereby certify that on December 21, 2020, a copy of the foregoing petition for discretionary review was sent by e-mail by utilizing the E-serve system to appellant's attorneys: Todd Morten, at tmorten@epcounty.com; Maya I. Quevedo Stevenson, at mquevedo@epcounty.com; and Octavio A. Dominguez, at odominguez@epcounty.com.

(2) The undersigned also does hereby certify that on December 21, 2020, a copy of the foregoing petition for discretionary review was sent by e-mail by utilizing the E-serve system to the State Prosecuting Attorney at information@SPA.texas.gov.

/s/ Tom A. Darnold
TOM A. DARNOLD

APPENDIX

COURT OF APPEALS' OPINION

COURT OF APPEALS
EIGHTH DISTRICT OF
TEXAS EL PASO, TEXAS

MARIO ERNESTO MARTELL, Appellant,	§	No. 08-18-00180-CR
v.	§	Appeal from the
THE STATE OF TEXAS,	§	Criminal District Court No. One
Appellee.	§	of El Paso County, Texas
	§	(TC# 990D03958)

O P I N I O N

This is an appeal from a judgment adjudicating guilt following placement on community supervision under deferred adjudication. After the State filed a motion to adjudicate guilt based on reporting violations, the trial court held a contested hearing in which Appellant Mario Ernesto Martell asserted the State had failed to exercise due diligence in executing the capias.[5] Following the hearing, the trial court adjudicated guilt and sentenced Martell to ten years' confinement in the Texas Department of Criminal Justice, which the court then suspended, and he was placed on ten years' community

[5] *See* TEX. CODE CRIM.PROC.ANN. art. 42A.108.

supervision. The trial court also ordered Martell to pay a $1,000 fine and court costs. By two issues, Martell contends that the trial court erred in rejecting his affirmative defense

of lack of due diligence. We reverse the revocation order and remand the cause to the trial court.

I. BACKGROUND

A. Martell's Community Supervision

In October 1999, Martell pleaded guilty to unlawful possession of marihuana in an amount of greater than five pounds but less than fifty pounds, and pursuant to a plea bargain with the State, he was sentenced to four years' deferred-adjudication community supervision. Under the terms and conditions of his community supervision, the trial court explicitly permitted Martell to live in Ciudad Juárez, Mexico, and he listed his address as "Juan Escutia # 1257." Yet, the terms also required that Martell report to his supervision officer, Carlos Estrello, at the offices of the West Texas Community Supervision and Corrections Department (the Department) in El Paso, Texas.

Only a few months after his probation began, Martell stopped reporting. Eventually, in March 2002, the State filed a motion to adjudicate guilt alleging Martell

failed to report from December 1999 through December 2001, among other violations not at issue in this appeal, and the trial court issued a capias for his arrest that same day. However, Martell was not arrested until August 2017. On his paperwork for a court-appointed attorney following this arrest, he listed his address as being in El Paso and indicated he had lived there for the preceding seven years.

B. The Revocation Hearing

A contested revocation hearing was held at which the sole witness was Adrian Aguirre, a court liaison officer with the Department, who brought the complete supervision file for Martell's case. Aguirretestified that the filecontained the day-to-day notes taken by theassigned supervision officer, Estrello, for the case but that Estrello no longer worked for the Department. Although Aguirre had been employed by the Department for nearly 24 years, he was never assigned to

Martell's case.

Based on the information in the file, Martell reported to Estrello only a few times after his community supervision began before Martell stopped reporting in December 1999. As Martell's address in Mexico at Juan Escutia was listed by him as both his home and employment address, the Department sent a letter to that address, reminding of his obligation to report, in January 2000 and again in February 2000. Also

in February, the Department placed a telephone call to a phone number in Mexico that Martell provided. However, a woman named Maribel, who stated that she was a friend of the family, answered the call, and Estrello was unable to speak to Martell. After these unfruitful efforts to contact Martell, the Department considered him to be an absconder and submitted violation notices to the District Attorney's Office for a prosecutor to seek revocation of Martell's community supervision.

Based on Aguirre's testimony, it is undisputed in this appeal that Martell's supervision file did not reflect that any attempts were made by the Department, the Sheriff's Office, or any other law-enforcement agency to contact Martell in person at his address in Mexico. Yet, after both sides ended their questioning, the trial court asked Aguirre, "as a probation officer, whoever was assigned to him, you would not be able to go to Juárez to do any home visits or anything like that?" Aguirre responded, "No, Judge."

At the conclusion of the hearing, the Stateargued that it satisfied its burden to proveMartell violated his community-supervision terms by failing to report and that Martell failed his burden to produce evidence making the due-diligence affirmative defense applicable to the case. In addition, the State argued that the evidence showed the Department simply "had no jurisdiction in Mexico," and the State urged the trial

court not to give Martell a windfall for violating his supervision terms while residing in a foreign jurisdiction where the Department and law-enforcement officers would not be able to contact him in person. In contrast, Martell argued that the evidence showed there was no in-person attempt to contact Martell at his last-known address in Mexico and that the due diligence affirmative defense therefore applied to the case. Martell urged the trial court to find that the State did not exercise the required due diligence and to deny revocation based on the plain language of the due-diligence affirmative-defense statute requiring some supervision officer, sheriff's deputy, or other peace officer to attempt in-person contact with him at his address in Mexico.

After hearing argument, the trial court announced its ruling on the record that the failure to-report allegations in the State's motion to adjudicate were true:

> [Trial court]: We had had a contested revo and there had been evidence, I guess, presented. And then what had happened is that both sides submitted -- I guess the whole issue was on whether Mr. Martell had received -- there had been efforts from the probation department to reassert supervision and whether he had been contacted.
>
> . . .
>
> [Trial court]: And then so I was provided with case law. I don't think -- I don't think I signed an order. So I want to make sure that I put it on record that I did consider the arguments on the due diligence. And that in chambers, I did tell both sides that the fact that Mr. Martell had been given permission to reside in Mexico, that I didn't feel that it was in the interest

> of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.
>
> So at that point, I asked that this hearing be set so that then I could -- we can determine, I guess, how we were going to move forward with the case.
>
> So I did find that the allegations in the motion to adjudicate guilt were true, that he didn't report during that -- this period of time in violation of his probation.

The trial court adjudicated Martell guilty, sentenced him to ten years' regular community supervision, and ordered that he remain in El Paso for its duration. Martell then filed his notice of appeal from the trial court's judgment adjudicating guilt.

II. Issues on Appeal

Martell asserts two issues in his appeal from the trial court's judgment. In Martell's first issue, he argues that the trial court erred in determining that he was not entitled to the due-diligence affirmative defense because he resided in Mexico and that the court thereby "fail[ed] to properly consider Martell's affirmative defense of due diligence." In Martell's second issue, he argues that, even if the trial court considered the availability of the defense, the court erred in revoking his community supervision because he proved that the State failed to exhibit due diligence where "[t]he uncontroverted evidence adduced shows that no attempt was ever made to contact Martell in person at his last known residence address or last known place of employment by any supervision officer, peace officer, or any other officer . . . ."

In response to Martell's first issue, the State argues, "the record shows that the

court expressly stated that it had considered the due-diligence issue, and the court merely determined and ruled that Martell had not met his burden of proving the affirmative defense." In response to Martell's second issue, the State argues, "Martell has failed in his burden of showing that the evidence was legally or factually insufficient to support the trial court's rejection of the affirmative defense." Regarding Martell's second issue, the State specifically argues that "because neither the probation department nor any other local law-enforcement officer had the jurisdictional authority to cross the international border in an attempt to make in-person contact with Martell at his listed and last-known address in Mexico, any such attempt at in-person contact would have been legally and factually impossible, and therefore futile[,]" and that, as a consequence, the Department's attempts to contact Martell by letter and phone call sufficed to show due diligence "because the law does not require the doing or attempting of a futile act[.]"

In our resolution of this appeal, we address Martell's second issue first, and since we find it dispositive of the appeal, we need not address Martell's first issue.[6] See

[6] We set this cause for submission on oral argument, and to the extent that either party presented new legal theories or requests for relief for the first time at oral argument, we decline to address those newly raised matters. *See* TEX. R. APP. P. 39.2 ("Oral argument should emphasize and clarify the written arguments in the briefs."); *French v. Gill*, 206 S.W.3d 737, 743 (Tex. App. – Texarkana 2006, no pet.) ("An issue or counter-issue may not be raised for the first time at oral argument unless the issue has been first presented in the parties' written brief."); *accord Nanos v. State*, No. 08-06-00173-CR, 2007 WL 2052180, at *3 n.1 (Tex. App. – El Paso July 19, 2007, no pet.) (not designated for publication).

TEX.R.APP.P. 47.1.

III. DISCUSSION

Issue Two: Did the Due-Diligence Affirmative Defense Preclude Revocation?

1. Standard of Review

A trial court's decision to proceed to an adjudication of guilt and revoke deferredadjudication community supervision is reviewed under the same standard as arevocation of regular community supervision. *Pena v. State*, 508 S.W.3d 599, 604 (Tex. App. – El Paso 2016, pet. ref'd). We review a trial court's order revoking community supervision for an abuse of discretion in light of the State's burden of proof. *Id*.

In a revocation proceeding, the State must prove only a single violation of a condition of community supervision by a preponderance of the evidence. *Id*. In this context, "a preponderance of the evidence" means that greater weight of the credible evidence which would create a reasonable belief that the defendant violated a condition of his community supervision. *Id*. If the State fails to meet its burden of proof, the trial court abuses its discretion in revoking community supervision. *Id*. Additionally, an abuse of discretion may occur where the trial court revokes

community supervision for an inappropriate reason. *Id*.

This standard of review is modified when a Court reviews an attack on the sufficiency of the evidence supporting the trial court's rejection of the due-diligence affirmative defense. Both the legal- and factual-sufficiency standards can apply to a review of a fact finder's rejection of an affirmative defense. *See Matlock v. State*, 392 S.W.3d 662, 667-71 (Tex. Crim. App. 2013). When conducting a legal sufficiency review concerning an issue on which the defendant had the burden of proof, we view the evidence in a light most favorable to the trial court's ruling and reverse only if the evidence conclusively establishes the opposite. *See id*. at 669. And in reviewing the factual sufficiency of such an issue, we review all of the evidence in a neutral light and determine whether the ruling is so against the great weight and preponderance of the evidence as to be manifestly unjust, conscience-shocking, or clearly biased. *See id*. at 671.

2. The Due-Diligence Affirmative Defense

In 2003, the Legislature added section 24 to article 42.12 of the Texas Code of Criminal Procedure (the then-existing community-supervision statutes) and codified a due-diligence affirmative defense to revocation of a defendant's community supervision. *See Garcia v. State*, 387 S.W.3d 20, 23 (Tex. Crim. App. 2012). And in 2017, this

statutory due-diligence affirmative defense was recodified, without substantive change, into the new community-supervision statutes relocated in Chapter 42A of the Texas Code of Criminal Procedure. *See Enriquez v. State*, No. 08-15-00324-CR, 2018 WL 2328225, at *2 n.1 (Tex. App. – El Paso May 23, 2018, no pet.) (not designated for publication).

Now, article 42A.109 provides the following due-diligence affirmative defense to the revocation of deferred-adjudication community supervision:

> For the purposes of a hearing under Article 42A.108 [to determine whether a condition of community supervision was violated], it is an affirmative defense to revocation for an alleged violation based on a failure to report to a supervision officer as directed or to remain within a specified place that no supervision officer, peace officer, or other officer with the power of arrest under a warrant issued by a judge for that alleged violation contacted or attempted to contact the defendant in person at the defendant's last known residence address or last known employment address, as reflected in the files of the department serving the county in which the order of deferred adjudication community supervision was entered.

TEX. CODE CRIM. PROC. ANN. art. 42A.109. As an affirmative defense, the burden of proving its applicability is on the defendant. *Garcia*, 387 S.W.3d at 23.

> In *Garcia*, the Court of Criminal Appeals observed that, in codifying the due-diligence

affirmative defense, the Legislature made the defense more favorable to the State than the common-law version in multiple ways. *See Garcia*, 387 S.W.3d at 23. So observing, the Court

wrote, "[i]t is plain that the Legislature intended to eliminate" certain common-law aspects of the

defense in enacting different, specific provisions for the newly-codified defense, and the Court

noted that "the Legislature apparently rejected the policy arguments" for those aspects not

incorporated into the newly-codified defense. *See id*. at 24-25. The Court expressly concluded,

"[w]e may not override the Legislature's intent in favor of countervailing policy considerations."

Id. at 25. And as the Court of Criminal Appeals explained in *State v. Ross*, it is the duty of all

Courts to refrain from intruding on the legislative realm:

> Courts have no power to legislate. It is the court's duty to observe, not to disregard statutory provisions. Courts can neither ignore nor emasculate the statutes. Further, courts have no power to create an exception to a statute, nor do they have power to add to or take from legislative pains, penalties and remedies. . . . It is for the Legislature, not the courts, to remedy defects or [ ] deficiencies in the laws, and to give relief from unjust and unwise legislation.

State v. Ross, 953 S.W.2d 748, 751 n.4 (Tex. Crim. App. 1997).

3. Application

Here, the record established there were no attempts to contact Martell in person

at his address in Mexico. Both parties recognize that this would normally trigger the

application of the due-diligence affirmative defense. But the State nonetheless

argues, under the unique facts established in our record, that Martell still failed

his burden of proving the due-diligence affirmative defense, and the State bases its

argument on the following two facets of this case: (1) Aguirre testified that no supervision officer from the Department would have been able to go to Mexico to do a home visit; and (2) in light of that, the Department performed what diligence it could, namely, sending letters to Martell's address and placing a telephone call to his phone number.

The State relies on *Hill v. State* from the Court of Criminal Appeals and *Ohio v. Roberts* from the United States Supreme Court for its argument that the law does not require the doing of a futile act and thus the "factual and legal impossibility" of the Department to make in-person contact with Martell at his Mexico address, based on the Department's lack of "jurisdictional authority" to do so, did not preclude the State from showing due diligence in light of the Department's other efforts – sending letters and placing a phone call. *See Hill v. State*, 90 S.W.3d 308, 316 (Tex. Crim. App. 2002) ("The law does not require a futile act.") (citing *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)). In *Hill*, the Court addressed an inapposite situation about whether a defendant met his burden of proving that his subsequent prosecution was barred by double jeopardy and whether an abatement was permissible to supplement the record with the trial court's reason for granting a mistrial during the defendant's first prosecution. *See Hill*, 90 S.W.3d at 311. After

determining that the trial court's grant of a mistrial was error and that there was nothing the State could establish at a post-abatement hearing to demonstrate the contrary, the Court, in a summary conclusion section excluded from the body of the opinion, briefly stated, "there could not be manifest necessity for a mistrial under these facts. Therefore, we need not decide whether abatement is permissible, because even if it is, it would not be a useful tool in this case. The law does not require a futile act." *Id*. at 315-16.

This phrase used in *Hill* onto which the State latches – "[t]he law does not require a futile act" – was drawn, in turn, from the United States Supreme Court's decision in *Ohio v. Roberts*. *See Hill*, 90 S.W.3d at 316 n.39 (where the Court of Criminal Appeals cites to *Ohio v. Roberts* for its articulation of the phrase, "[t]he law does not require a futile act."); *see also Roberts*, 448 U.S. at 74. While the Supreme Court did state, "[t]he law does not require the doing of a futile act[,]" the Supreme Court used that phrase in the context of a reasonableness inquiry into whether the prosecution made a good-faith effort to obtain a witness's presence for trial to establish unavailability under the Confrontation Clause. *See Roberts*, 448 U.S. at 74.

In the criminal jurisprudence of Texas, this notion that the law does not require a futile act, as derived from *Roberts* by *Hill*, has been applied almost solely in the context

in which it arose in the United States SupremeCourt, namely, the totality-of-the-circumstances reasonableness inquiry for prosecutorial good-faith in seeking an unavailable witness. *See, e.g.*, *Reed v. State*, 312 S.W.3d 682, 685-86 (Tex. App. – Houston [1st Dist.] 2009, pet. ref'd); *Loun v. State*, 273 S.W.3d 406, 420 (Tex. App. – Texarkana 2008, no pet.); *Otero-Miranda v. State*, 746 S.W.2d 352, 354 (Tex. App. – Amarillo 1988, pet, ref'd). That status quo has also been the same for this Court. *See Reyes v. State*, 845 S.W.2d 328, 332 (Tex. App. – El Paso 1992, no pet.). However, we do observe that the concept that the law does not require a futile act has arisen in other contexts, such as the examination of defense counsel's performance for an ineffective-assistance claim and the examination of whether performance of a futile act under a contract was required. *See Thel Chok Ngung v. State*, No. 07-13-00315-CR, 2014 WL 2191999, at *4 (Tex. App. – Amarillo May 23, 2014, pet. ref'd) (mem. op., not designated for publication) ("We first observe that it has become a well-established principle that a reasonably competent counsel need not perform a useless or futile act."); *Duncan v. Woodlawn Mfg., Ltd.*, 479 S.W.3d 886, 895-98 (Tex. App. – El Paso 2015, no pet.) (where this Court observed, in the context of an argument as to whether a party was required to follow a notice-and-cure provision of a contract, that "Texas law does not require the performance of a futile

act."). Nonetheless, we ultimately see the viability of such a concept as having roots in analyses of totality-of-the-circumstances claims where all the circumstances are taken into account in a legal determination. We do not believe that the concept can apply to a situation where the Legislature has chosen to specifically circumscribe the limits of a Court's analysis on the issue of an affirmative defense like the one at issue here.

And in fact, the Court of Criminal Appeals has expressly cautioned against overriding the Legislature's intended application of the due-diligence affirmative defense, as evidenced by the Legislature's careful elimination and provision of certain aspects for the statutory defense when adopting it from its common-law origins. *See Garcia*, 387 S.W.3d at 23-25. Simply, the State is asking us to carve out an exception to the statutory due-diligence affirmative defense based on case-specific factual concerns, and it is this action that we cannot do. *See Ross*, 953 S.W.2d at 751 n.4 (observing that Courts have no power to legislate and create an exception to a statute).

Accordingly, this Court must follow the plain dictates of the statutory due-diligence affirmative defense here. Based on the facts established at the revocation hearing, it is undisputed that no supervision officer, peace officer, or other officer attempted in-person contact with Martell at the address used for both his residence and employment, and Martell satisfied his burden of proving the due-diligence affirmative

defense. *See* TEX.CODE CRIM.PROC.ANN. art. 42A.109. No record evidence exists to the contrary. Therefore, the evidence was both legally and factually insufficient to support the trial court's rejection of the due-diligence affirmative defense. *See Matlock*, 392 S.W.3d at 669, 671. And the trial court thus abused its discretion in proceeding to an adjudication of guilt and in revoking Martell's deferred-adjudication community supervision. *See Pena*, 508 S.W.3d at 604.

We sustain Martell's second issue presented for review, and since our resolution on this issue is dispositive of his appeal, we need not consider his first issue presented for review.

IV. CONCLUSION

We reverse the trial court's judgment adjudicating Martell's guilt and remand the cause to the trial court with instructions to dismiss the motion to adjudicate.

GINA M. PALAFOX,
Justice November 20, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

(Publish)

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